LIM TJOEN KONG

v.

A-B CHEW INVESTMENTS PTE. LTD.

COURT OF APPEAL, SINGAPORE
YONG PUNG HOW CJ
CHAN SEK KEONG J
FA CHUA J
[CIVIL APPEAL NO. 91 OF 1986]
5 JULY 1991

CONTRACT: *Breach - Damages.*

EVIDENCE: *Admissibility of without prejudice negotiations - Waiver of Privilege - Evidence Act [Sing], ss. 2(2), 23.*

CIVIL PROCEDURE: *Without prejudice negotiations between parties and agent - Admissibility - Rule in Rush v. Tompkins.*

On 30 October 1985, the respondents sued the appellant for damages for breach of contract. The appellant had agreed to purchase 640,000 shares in SPP Ltd. from the respondents at the total purchase price of over S$2.2 million and to complete the purchase by September 1983. Pending completion, the appellant was required to reimburse interest payments accruing on certain overdrafts of the appellants and CBG. The appellant failed to complete the purchase but continued to reimburse the said interest payments to the respondents until 27 May 1985.

The appellant having failed to complete the purchase despite repeated demands, the respondents sold the shares in the open market in two lots, and in the process lost over S$1.58 million. The respondents claimed this amount from the appellant. On 25 November 1985 the appellant took out an application to strike out the action on the ground that he was not in Singapore on the material date when the sales contract was alleged to have been made.

On 15 February 1986 the respondents applied for summary judgment. On 18 February 1986 the respondents' managing director (CBG) swore an affidavit that the sales contract was made on 26 June 1983 between the respondents and the appellant's personal secretary (JK) who acted on the appellant's behalf. In his affidavit in reply, JK said that the respondents approached him in June 1983 to dispose of the said shares "on an option basis for 24 months." JK maintained that the respondents did not sell the said shares to the appellant and that the respondents in fact approached another broker (IG) who agreed to take the option. In time, however, when the price of shares fell, IG too changed his mind and the option was cancelled.

In his affidavit in reply, CBG denied ever having known or heard of IG. CBG maintained that the appellant himself carried on negotiations as to the terms of completion of purchase. This was denied by JK. The appellant then made two applications - the first to strike out the respondents' action and the second to strike out certain paragraphs in CBG's affidavit which the appellant alleged contained certain "without prejudice" matters under negotiation between CBG on behalf of the respondents and the appellant. The Assistant Registrar held that certain paragraphs should be struck off. The respondents' appeal was allowed by Coomaraswamy's J decision.

The first ground was that the privilege extended only to parties and their solicitors, and that the defendant was not entitled to claim privilege as he was not a party to the negotiations; secondly that in any event, the privilege had been waived by the appellant by adducing evidence of the negotiations which might otherwise have been privileged.

Held:

[1] The trial Judge was wrong to the extent that he found as a fact that the appellant was not a party to the negotiations. The idea that the appellant was not a party to the negotiations was the last thing that the respondents had in mind, as that would have meant the negotiations, whatever they were about, had nothing to do with the appellant and therefore were not relevant in proving that he was or might be liable.

[2] A literal reading of s. 23 of the Evidence Act suggests that the privilege from disclosure of without prejudice negotiations is confined to the parties to the action (and their solicitors or agents). This section has to be read subject to s. 2(2) of the Evidence Act.

[3] Waiver as a form of promissory estoppel has nothing to do with waiver of privilege, the former being an equitable principle and the latter being a rule of evidence. The argument that the respondents would suffer no injustice or detriment in the circumstances was wholly unrealistic. The respondents' inability to adduce evidence to rebut the allegations of the appellant as to the substance of the negotiations would have resulted in unconditional leave being given to the appellant.

[4] There was no question of a withdrawal by the defendant of his waiver of privilege. The respondents' position was that there was only one set of negotiations between them and the defendant. If the respondents' allegation is found to be true, the question of withdrawal of waiver by the appellant does not arise. If the appellant's allegation is found to be true, the question that arises is whether there is a waiver of the privilege in respect of the second set of negotiations.

[5] The appellant sought to introduce evidence of alleged negotiations between the respondents and IG, through JK, which were admittedly privileged from disclosure without the consent of the respondents. What they did was to waive their privilege, if any, in respect of the negotiations and at the same time gave their own version of what the negotiations were about. If the respondents' version of the negotiations was the truth, then the relevant issue would be whether the appellant had opened the door to disclosure by adducing evidence of an untrue version of such negotiations.

[6] If a party to an action seeks to adduce in evidence without prejudice negotiations with the other party, the other party is entitled to either object to such evidence being admitted or allow it to be admitted and/or giving his own version of the negotiations. In the latter case, the evidence becomes admissible because there is a waiver of privilege by both the parties.

[7] What has happened here is that the issue of admissibility has been decided purely on legal arguments without reference to the factual situation. On this ground alone, the decision of the Assistant Registrar was wrong. This was an application to strike out the relevant paragraphs in CBG's affidavits which sought to introduce the respondents' version of the negotiations. In this case, there is a dispute as to the nature of the negotiations and the parties thereto. If the appellants' allegation is found to be true, the question that arises is whether there is a waiver of the privilege in respect of the second set of negotiations. It was not proper to strike out these paragraphs in the absence of a finding that there were two sets of negotiations, that the second set of negotiations was privileged from disclosure and that the defendant had not waived the privilege.

[8] The objective of the rule in *Rush & Tompkins v. GLC* is to encourage litigants to settle their differences, without fear of negotiations being admitted in evidence if no settlement is reached. But the rule is not absolute and resort may be had to the without prejudice material for a variety of reasons when the justice of the case requires it.

[9] Accordingly, the matter must be sent back to the Registrar for him to determine the preliminary issue of fact as to which of the two versions of the negotiations is true. Having so decided, the Registrar must further decide whether there is a triable defence.

[Appeal dismissed with costs.]

Cases referred to:
La Roche v. Armstrong [1922] 1 KB 485 ***(cit)***
Rush & Tompkins Ltd. v. GLC [1988] 3 All ER 737 ***(cons)***
Sobell v. Boston [1975] 2 All ER 282 ***(dist)***
Walker v. Wilsher [1889] 23 QBD 335 ***(cit)***
WJ Alan Ltd. v. El Nasr Export & Import Co. [1972] 2 All ER 420 ***(dist)***

Legislation referred to:
Evidence Act [Sing], ss. 2(2), 23

Other sources referred to:
Spencer Bower on Estoppel, 2nd Edn., pp. 288-293

For the appellant - Harry Wee (Robin Lim with him)
For the respondents - K. Chettiar (Dr. Myint Soe with him)

JUDGMENT

Chan Sek Keong J:

This appeal raised a number of issues relating to the admissibility in evidence of "without prejudice" negotiations between the parties and their agents. At the conclusion of the hearing on 14 May 1991, we dismissed the appeal of the defendant and said we would give our reasons later.

On 30 October 1985, the plaintiffs commenced this action against the defendant for damages for breach of contract. In the statement of claim, the plaintiffs have averred the following: that on or about 28 June 1983, the defendant agreed to buy from the plaintiffs 640,000 shares (the said shares) in SPP Ltd., which shares were listed on the Stock of Exchange of Singapore, at the total price of $2,278,400 (at $3.56 per share), and to complete the purchase by September 1983; that pending completion, the defendant should reimburse the interest accruing on the plaintiffs' and CBG's overdraft accounts with 3 banks, subject as from February 1984 to an overdraft limit of $2,278,400; that the defendant failed to complete the purchase by September 1983 but continued to pay the plaintiffs the said interest calculated as aforesaid until September 1984; that on 24 December 1984, the defendant paid $20,000 and on 27 May 1985 paid another sum of $30,000 to account of interest due; that the defendant failed to complete the purchase in spite of repeated demands and thereupon the plaintiffs sold, on 10 December 1984 and 17 December 1984 respectively, the said shares in the open market in two lots, 500,000 at $1.10 per share and 140,000 at $1.10 per share, and realized the net sum of $696,079. Accordingly, the plaintiffs have claimed the difference of $1,582,231 and interest thereon against the defendant for breach of contract.

On 25 November 1985, the defendant took out an application to strike out the action on the ground that the defendant was not in Singapore on 28 June 1983, which he deposed to in his affidavit, and therefore could not have agreed to purchase the said shares.

On 15 February 1986, the plaintiffs filed an application for summary judgment against the defendant. CBG, the managing director of the plaintiffs, swore an affidavit filed on 18 February 1986 in which he deposed as follows: that on 28 June 1983 he offered the said shares to the defendant (who was then a substantial shareholder of SPP Ltd.) through the defendant's personal secretary, one JK, as the defendant was not in Singapore; that JK later on the same day telephoned him and accepted the offer on behalf of the defendant on the terms as set out in the statement of claim, except that in relation to interest, the plaintiffs subsequently agreed voluntarily to limit the interest payment to an overdraft limit of $2,278,400 as from February 1984; that the defendant paid with his own cheques the interest on the plaintiffs' and CBG's overdraft accounts for the months July 1983 up to September 1984; that in August 1984 the plaintiffs sent to the defendant their cheque for $19,200 being the net dividend declared and paid by SPP Ltd. on the said shares as the same had been sold to the defendant; that when the September interest was due, the defendant returned the said cheque to the plaintiffs together with the sum of $3,774 to make up the amount payable for interest in the statement of claim with his own cheques; that the defendant defaulted in the payment of interest from October 1984, except for the two sums of $20,000 and $30,000 referred to in the statement of claim; that the defendant failed to complete and the plaintiffs had to sell the said shares to mitigate their loss.

In his affidavit filed on 12 March 1986, JK deposed, *inter alia*, as follows: that in June 1983, the plaintiff approached him to dispose of the said shares at $3.56 per share "on an option basis open for 24 months subject during that period or until the exercise of the option to paying interest less dividends on his overdraft account at one of the banks; that he did not sell the said shares to the defendant; that he approached one IG, an Indonesian banker, who agreed to take up the option; that by October 1984, "the share [price] had dropped heavily and it was discovered that the representations or information given by the plaintiff was false or inaccurate"; that, in para. 15, IG "then began to have different views regarding the exercise of the option and after negotiations on behalf of [IG] and the plaintiff the option was cancelled".

JK's affidavit was substantially confirmed by IG who in his affidavit filed on 14 March 1986 deposed, *inter alia*, that, in para. 10:

> After a series of discussions between the plaintiffs and my intermediaries it was agreed in early December 1984 I could abandon the option provided I paid interest in the sum of $50,000 payable in 2 installments and I duly paid the same.

CBG swore an affidavit on 3 May 1986 in reply to the affidavits of JK and IG. Having denied, in para. 10, that he knew or heard of IG, CBG went on to say, in para. 11:

> 11. I crave leave to refer to para. 10 of the affidavit of Irwan Gozali. The negotiations were carried out between the defendant himself and on his behalf by John Khoo with Mr. Subhas Anandan and were on the methods of payment of the shortfall represented by the agreed price of $2,278,400 less the total proceeds of $696,079 from the sale of SPP Ltd. shares in the market. One of the proposals put forth by the defendant to Mr. Subhas Anandan to pay the shortfall of $1,582,231 plus the outstanding interest was by way of transfer of three units of housing at One Tree Hill Gardens being developed by T.K. Lim Realty Pte. Ltd. the defendant's company.

JK's affidavit in reply was sworn on 15 May 1986. In para. 9 thereof, he said:

> 9. As regards para. 11 of the said affidavit, I deny that there was any representation made by me on behalf of the defendant to Mr. Subhas Anandan who was acting for me in the without prejudice negotiations regarding the balance of the overdraft interest and not the alleged shortfall

claimed against the defendant. Mr. Subhas Anandan had certain buyers who were interested in the property referred to therein and had requested more particulars thereof.

On 17 May 1986, CBG swore another affidavit, in paras. 4 and 5 of which he said:

> 4. As to para. 9 of the affidavit, annexed hereto and marked "CBG4" is a draft prepared by Mr. Subhas Anandan which incorporated one of the proposals made by the defendant for securing payment of the amount claimed by the plaintiff by the issue of shares to the plaintiff by Alethea Pte. Ltd. which shares were to be paid for by capitalisation of the defendant's loans to his own family company.
>
> 5. The proposal set out in "CBG4" fell through and the defendant offered to transfer 3 units of housing in the One Tree Hill Garden. For this purpose I had a valuation of the units made. Annexed hereto and marked "CBG5" is a copy letter to Mr. Subhas Anandan dated 25 January 1985 enclosing the valuation. The price of the units to be transferred to the plaintiff was to be the payment of the amount due to the plaintiff. As the price of the 3 units pegged at $280 p.s.ft. exceeded the amount of the plaintiffs claim, the plaintiff eventually agreed to take two units with the balance of its claim to be paid by the defendant in cash. I then instructed Messrs Goh Poh & Partners to help in drafting an agreement for this proposal. However, the searches showed that the property was encumbered to a limit of $5,000. Annexed hereto and marked "CBG6" is a copy of the company search on Alethea Pte. Ltd. showing the charges registered against the company and a copy of the certificate of title showing the encumbrances marked "CBG7". Goh Poh & Partners then wrote to Mr. Subhas Anandan on 30 July 1985 as per annexure "CBG8".

On 20 May 1986, the defendant took out an application to strike out and/or delete from the records of the Court para. 11 of CBG's affidavit of 3 May 1986 and paras. 4 and 5 of CBG's affidavit of 17 May 1986. In support of this application, JK swore an affidavit on 20 May 1986, in paras. 3, 7 and 8 of which he said:

> 3. The contents of the said affidavit and exhibits referred to were made in without prejudice negotiations entered into between the plaintiff represented by [CBG] and the defendant and [IG] who I represented.
>
> 7. The said negotiations arose out of meetings between the plaintiff and myself regarding outstanding interest on an option for the purchase of shares belonging to the plaintiff.
>
> 8. However, during the course of these negotiations the plaintiff pleaded that he was in considerable difficulty with his overdrafts at the Overseas Chinese Banking Corporation Limited and Banque Indosuez where he had account that he was "forced" to bring the action and that he needed to be able to show that there was some moneys claimed or available from the defendant who was well known in Singapore circles as a prominent businessman.

The defendant's two applications, the first to strike out the plaintiffs' action and the second to strike out the said paragraphs in CBG's affidavits, and the plaintiffs' application for summary judgment were all fixed for hearing before the Assistant Registrar. The issue raised in the defendant's second application was whether the said paragraphs in CBG's affidavits should be struck out as they referred to negotiations between CBG on behalf of the plaintiffs and the defendant which the defendant claimed were made without prejudice. The Assistant Registrar heard this application first and made an order in terms thereof. He adjourned the other two applications pending the outcome of the plaintiffs' appeal against his decision.

The appeal was heard by Coomaraswamy J who allowed it. The defendant appealed against this decision and it is this appeal we have dismissed.

The Judge gave several reasons for allowing the appeal. The first was that the privilege extended only to parties and their solicitors (and for this proposition, reference was made to s. 23 of the Evidence Act and *La Roche v. Armstrong* [1922] 1 KB 485), and that the defendant

was not entitled to claim privilege as he was not a party to the negotiations. The Judge found that the inconsistency in JK's affidavits as to the defendant's participation in the negotiations had not been satisfactorily explained.

The second reason given by the Judge was that, in any event, the privilege had been waived by the defendant by adducing evidence of the negotiations which might otherwise have been privileged. The Judge also said that public policy would not allow the defendant to blow hot and cold on this matter. He held that it was the defendant who had opened the door of privilege by filing the affidavit of JK of 12 March 1986 and IG's affidavit of 14 March 1986 to adduce evidence of negotiations regarding the plaintiffs' claim and that the plaintiffs had merely, in CBG's affidavits, sought to challenge the defendant's version of the negotiations. He was also of the view that the defendant could have taken out an application to strike out the offending disclosures by CBG, but, instead of so doing, he filed another affidavit of JK on 15 May 1986 which descended into the details of what had transpired during the negotiations. Accordingly, the Judge was of the view, that the defendant had opened the door even wider.

Before us, Counsel for the defendant made two main submissions that the decision of Coomaraswamy J was wrong.

Parties to Negotiations

The first was that the Judge was wrong in finding that the defendant was not a party to the negotiations. Counsel pointed out that it was not in dispute that JK was the defendant's agent and that was what the plaintiffs had claimed all along. He further argued that JK's only purpose was to settle the action on behalf of the defendant and that there was no inconsistency in JK's affidavits as IG had claimed that he had only an option and was the only party concerned, and any settlement for his benefit would consequently be for the defendant's benefit also as the claim against the defendant would go.

In our view, Counsel's argument was correct to the extent that the Judge found **as a fact** that the defendant was not a party to the negotiations. There was no doubt that the plaintiffs' case had always been that JK acted for the defendant in the alleged sale and the negotiations; otherwise it would have been pointless for the plaintiffs to have sued the defendant and to have attempted to adduce evidence to rebut the defendant's allegation that they had negotiated and settled with IG. The idea that the defendant was not a party to the negotiations was the last thing that the plaintiffs had in mind, as that would have meant the negotiations, whatever they were about, had nothing to do with the defendant and therefore were not relevant in proving that he was or might be liable.

Counsel's next argument was that, assuming that the Judge's finding that the defendant was not a party to the negotiations was correct, the Judge was wrong in law in holding that the privilege against disclosure of without prejudice negotiations was confined only to the parties to the action and their solicitors. (The defendant was, of course, a party to the action, but the defence was that the real defendant should have been IG). Counsel referred to *Rush & Tompkins Ltd. v. GLC* [1988] 3 All ER 737, HL. In that case, the plaintiffs, the main contractors, had commenced proceedings against the 1st defendants (GLC), the employers, and the 2nd defendants who were the subcontractors, for an inquiry into the loss and expenses to which the 2nd defendants were entitled under the subcontract arising out of delay in the completion of a project, and a declaration that they were entitled to be reimbursed that sum by the GLC. Later, the plaintiffs settled their claim against GLC in the sum of £l.2 million on the condition that the plaintiffs would be responsible for the subcontractors' claims. The 2nd defendants

subsequently made a counterclaim to recover their loss and expense and sought discovery of the documents in the possession of the plaintiffs relating to the settlement with GLC which they believed would show the plaintiffs' quantification of the 2nd defendants' claim for the purpose of the settlement. The plaintiffs objected to discovery.

The House of Lords held that without prejudice correspondence entered into with the object of effecting the compromise of an action remained privilege after the compromise had been reached and accordingly the correspondence was inadmissible in any subsequent litigation connected with the same subject matter whether between the same or different parties, and furthermore, was protected from subsequent discovery by other parties to the same litigation.

Rush & Tompkins was decided after Coomaraswamy J had given his written grounds of decision and therefore was given no opportunity to consider its applicability in the light of s. 23 of the Evidence Act which provides as follows:

> In civil cases, no admission is relevant if it is made either upon an express condition that evidence of it is not to be given, or in circumstances from which the Court can infer that the parties agreed together that evidence of it should not be given.

A literal reading of s. 23 suggests that the privilege from disclosure of without prejudice negotiations is confined to the parties to the action (and their solicitors or agents). This section has to be read subject to s. 2(2) of the Evidence Act which provides as follows:

> All rules of evidence not contained in any written law, so far as such rules are inconsistent with any of the provisions of this Act, are repealed.

The rule of evidence in *Rush & Tompkins* may or may not be inconsistent with s. 23. There is room for argument that it may not be. However, this point was not adequately argued by Counsel for the plaintiffs and not argued at all by Counsel for the defendant. In view of this, we do not consider it desirable to decide this point. In any event, the principle in *Rush & Tompkins* has no application to the issue before us. In that case, A had a claim against B which included part of C's claim against A. A settled with B, and the issue was whether the negotiations between A and B were subject to discovery by C in order to substantiate C's claim against A. In the instant case, the issue is whether A (the plaintiffs) are entitled to rebut B's (the defendant's) allegation that A had negotiated and settled their claim with C (IG) by adducing evidence that the negotiations were with B and not C. The third party does not come into the picture until it has been determined that the defendant's version is the true version.

Waiver of Privilege

The second submission of Counsel for the defendant was that the Judge was wrong in holding that the defendant had waived the privilege which protected the without prejudice negotiations. He advanced several arguments in criticism of the Judge's reasoning which we will now consider, but not in the order in which they were advanced.

The first criticism was that the Judge had said that waiver was a matter of contract. Counsel pointed out that waiver was not a matter of contract but a privilege recognised by statute, that is, s. 23 of the Evidence Act, and that it required the consent of both parties to bring into the open what would otherwise be privileged: see *Walker v. Wilsher* [1889] 23 QBD 335. In our view, this criticism was misdirected as the Judge did not decide or say that waiver was a matter of contract. He had merely sought to explain waiver **in contractual terms,** that is, the unilateral act of the defendant in introducing evidence of the negotiations between the plaintiffs and IG as a repudiation of a term of a contract by the defendant; and that the plaintiffs, being entitled to accept or reject the breach, chose to accept the breach. Although

it might be said that an explanation in these terms was not necessary, the underlying basis thereof was not necessarily incorrect, as behind the veil of privilege is always an agreement, express or implied, between the parties that "without prejudice" negotiations are not admissible, and he who repudiates that "agreement" gives the other party the option of accepting it (by bringing in evidence of his version of the negotiations) or rejecting it (by pleading privilege).

Counsel's next argument was that there was no waiver by the defendant as the plaintiffs would not suffer any injustice or detriment by the defendant's disclosure of the negotiations between the plaintiffs and JK as agent of IG. In this connection, he cited various authorities on waiver as an equitable defence, for example, *Spencer Bower on Estoppel*, 2nd Edn., pp. 288-293, *WJ Alan Ltd. v. El Nasr Export & Import Co.* [1972] 2 All ER 420. In our view, these authorities were irrelevant. Waiver as a form of promissory estoppel has nothing to do with waiver of privilege, the former being an equitable principle and the latter being a rule of evidence. In fact, of course, the argument that the plaintiffs would suffer no injustice or detriment in the circumstances was wholly unrealistic. The plaintiffs' inability to adduce evidence to rebut the allegations of the defendant as to the substance of the negotiations would have resulted in unconditional leave being given to the defendant.

The third argument of Counsel for the defendant was that even if the defendant had waived his privilege, he was entitled to and did withdraw the waiver, it being a matter of election. We rejected this argument for the following reasons: firstly, we did not think that a waiver could be withdrawn. Counsel produced no authority to support his proposition. Secondly, the argument was predicated upon the existence of the two sets of negotiations as alleged by the defendant. There was no finding of fact on this point. In any event, there was no question of a withdrawal by the defendant of his waiver of privilege. The plaintiffs' position was that there was only one set of negotiations between them and the defendant. If the plaintiffs' allegation is found to be true, the question of withdrawal of waiver by the defendant does not arise. If the defendant's allegation is found to be true, the question that arises is whether there is a waiver of the privilege in respect of the second set of negotiations.

Counsel indeed so argued, that in relying on the plaintiffs' negotiations with IG by way of defence, the defendant did not waive the privilege with respect to his own without prejudice negotiations with the plaintiffs. He relied on the statement of Goff J in *Sobell v. Boston* [1975] 2 All ER 282 that in rebutting an alleged statement made "without prejudice", it is quite proper for the other party to supply contrary facts in the event that the Court decides that there is no privilege. So it is. But, again, this statement has no application to the facts of the instant case. In *Sobell v. Boston*, Sobell, in support of his claim, had referred in his affidavit to a statement as having been made by Boston in a discussion between themselves in connection with their partnership dispute, the subject matter of the action. Boston filed an affidavit in reply, giving his own version of the discussion, and also stating that Sobell had agreed that the whole discussion was without prejudice. Sobell contended that Boston had waived his privilege by letting in evidence in his affidavit in reply. Goff J held that there was no waiver of privilege. He reasoned as follows:

> [Boston's] affidavit could not, in my judgment, of itself be a waiver. Where the evidence is given by affidavit the opposing party is faced with a *dilemma*. If he says, merely, 'I am advised that this is inadmissible and I need not answer it', then if the objection is overruled he must seek an adjournment which may not be allowed or only on adverse terms as to costs and if he does not, or if his application be not granted, he will be left with no evidence on his side. I cannot think that the privilege can be waived by an affidavit which says, 'I object that my opponent's affidavit is inadmissible because the matter it contains is privileged, but in any case should the evidence be received, I say it is wrong, and this is my version.'

In the case before us, it was the defendant who sought to introduce evidence of alleged negotiations between the plaintiffs and IG, through JK, which were admittedly privileged from disclosure without the consent of the plaintiffs. They, following *Sobell v. Boston*, could have objected to this evidence being admitted and at the same time filed an affidavit giving their own version of the negotiations. But they did not do it in that manner. What they did was to waive their privilege, if any, in respect of the negotiations and at the same time gave their own version of what the negotiations were about. If the plaintiffs' version of the negotiations was the truth, then the relevant issue would be whether the defendant had opened the door to disclosure by adducing evidence of an untrue version of such negotiations.

In *Sobell v. Boston*, there was no dispute as to the nature of the discussions and the parties thereto. Here, there is a dispute as to the nature of the negotiations and the parties thereto. This difference was the key to the resolution of this appeal. If a party to an action seeks to adduce in evidence without prejudice negotiations with the other party, the other party is entitled to either object to such evidence being admitted or allow it to be admitted and/or giving his own version of the negotiations. In the latter case, the evidence becomes admissible because there is a waiver of privilege by both the parties. Accordingly, where, as here, there is a dispute on whether the negotiations referred to by the defendant are the same negotiations as claimed by the plaintiffs, the Court must first resolve this preliminary issue of fact. If the plaintiffs' version is true, it is our view that the privilege from disclosure has been waived by the defendant by his adducing an untrue version thereof in evidence. If the defendant's version is true, then the question arises whether the second set of negotiations is subject to privilege.

What has happened in the instant case is that the issue of admissibility has been decided purely on legal arguments without reference to what the factual situation was. On this ground alone, the decision of the Assistant Registrar was wrong. This was an application to strike out the relevant paragraphs in CBG's affidavits which sought to introduce the plaintiffs' version of the negotiations. It was not proper to strike out these paragraphs in the absence of a finding there were two sets of negotiations, that the second set of negotiations was privileged from disclosure and that the defendant had not waived the privilege.

Counsel for the defendant also submitted that if we allowed the plaintiffs to bring in evidence of their version of the negotiations, we would undermine the public policy considerations which disallow without prejudice negotiations from disclosure, and that we would be opening the floodgates of privilege. We disagreed. In *Rush v. Tompkins*, Lord Griffiths said, at pp. 739h-740d:

> The 'without prejudice' rule is a rule governing the admissibility of evidence and is founded on the public policy of encouraging litigants to settle their differences rather than to litigate them to the finish ... The rule applies to exclude all negotiations aimed at settlement whether oral or in writing from being given in evidence ... However, the application of the rule is not dependent on the use of the phrase 'without prejudice' and if it is clear from the surrounding circumstances that the parties were seeking to compromise the action, evidence of the content of the negotiations will, **as a general rule,** not be admissible at the trial and cannot be used to establish an admission or partial admission. I cannot therefore agree with the Court of Appeal that the problem in the present case should be resolved by a linguistic approach to the meaning of the phrase 'without prejudice'. **I believe that the question has to be looked at broadly and resolved by balancing two different public interests, namely the public interest in promoting settlements and the public interest in full discovery between the parties to litigation.** [Emphasis added].

In the balance of competing public interests, we had no doubt whatever where the balance fell in the instant case. The purpose of the rule is to encourage litigants to settle their differences, without fear of negotiations being admitted in evidence if no settlement is reached. A party may wish to settle a claim, although he may think that he is not liable. But "the rule is not absolute and resort may be had to the without prejudice material for a variety of reasons when the justice of the case requires it." (per Lord Griffiths in *Rush & Tompkins* at p. 740e). In the circumstances of this case, to hold otherwise will encourage the suggestion of evidence which may prove what is false and the suppression thereof which may prove what is true. That is not the object of the rule.

Accordingly, the matter must now go before the Registrar for him to determine the preliminary issue of fact as to which of the two versions of the negotiations is true. The consequential problem is whether we should order that the application, the subject matter of this appeal, be restored for hearing before the Registrar together with the other two pending applications. In our view, it would be unnecessary to do so as the same objection against the admissibility of the plaintiffs' evidence on the negotiations may still be taken in the O. 14 application. It was unnecessary for the defendant to have taken out a separate application to strike out the relevant paragraphs. The fact that such evidence is contained in affidavits does not make it admissible. Similarly, the fact that both the defendant's allegations and the plaintiffs' allegations on the negotiations are contained in affidavits does not mean that the issue as to which version is true cannot be decided on the affidavit evidence. It is a question of credibility. The Registrar must now decide this issue of fact and, in the light of such a determination, further decide whether there is a triable defence.

The appeal was accordingly dismissed with costs.

Also found at [1991] 3 CLJ 1945